**VIA CERTIFIED MAIL**
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September 19, 2005

Blue Tee Corp.
c/o Terrance Gileo Faye, Esq.
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**Re: Old American Zinc Plant Superfund Site, EPA Docket No. V-W-05-C-819**

Dear Counsel:

Pursuant to Paragraph 25 of the above-referenced June 6, 2005 Unilateral Administrative Order, this letter responds to the August 24, September 2, and September 13, 2005 letters from Richard Greenberg, Esq. regarding XTRA's July 5 good-faith offer to share in the costs of the Remedial Investigation and Feasibility Study ("RI/FS") that Blue Tee is performing at the Old American Zinc site ("the Site").1

As we assume you both know, Blue Tee previously rejected XTRA's July 5 offer in a letter dated August 24, 2005 from Mr. Greenberg. However, at that time Blue Tee made no counter-offer. Instead, Blue Tee simply charged that XTRA's offer was not made in good faith,2 and demanded that XTRA make another offer. *See* Letter from Richard Greenberg, Esq. to Michael W. Steinberg, Esq. (Aug. 24, 2005).

One week later, in response to my request for a counter-offer from Blue Tee, Mr. Greenberg sent the September 2 letter. In that letter, Mr. Greenberg curiously stated that Blue Tee "believes a good faith offer should be for XTRA to share 38%" of the RI/FS costs at the Site. Unfortunately, Mr. Greenberg's September 2 letter offered no explanation for Blue Tee's "belief" and provided no support for the 38% figure.

The remainder of this letter responds to both the September 2 letter and also to the August 24 letter that preceded it.3

Blue Tee Has Not Made a Counter-Offer

At the outset, XTRA wishes to point out that Blue Tee's September 2 letter does not constitute a counter-offer. The September 2 letter does not say that Blue Tee would accept 38%—even if XTRA were to offer 38%—in settlement of its claim against XTRA.

Instead, Blue Tee's letter simply insists that any offer by XTRA of a lower percentage would not

be considered a good-faith offer by Blue Tee. This rigid position may doom negotiations between the parties because, as discussed below and as previously shown in our July 5 letter, XTRA's equitable share of liability does not even remotely approach the 38% figure now cited by Blue Tee.

Blue Tee's Share of Liability Far Exceeds XTRA's Share

Despite Blue Tee's failure to explain its reasoning, it nevertheless is readily apparent that 38% far exceeds XTRA's equitable share of the RI/FS costs at the Site. After all, the General Services Administration—the successor to the largest "arranger" at the Site—has already agreed to pay a minimum of 22.5% of all RI/FS costs. That leaves a maximum of 77.5% to be divided between Blue Tee and XTRA.4

With 77.5% or less at stake, if XTRA were to pay 38%, as Blue Tee has demanded, then Blue Tee and XTRA would each be paying almost exactly the same amount (39.5% or less for Blue Tee versus 38% for XTRA). Such an outcome would be extraordinarily inequitable.

As XTRA has previously pointed out, and as Blue Tee does not deny, Blue Tee is the successor to the owner and operator of the massive zinc smelting facility throughout its half-century of operations. Blue Tee thus bears primary responsibility for generating all of the wastes—including the slag or "clinker"—that were disposed of at the Site.

XTRA, in sharp contrast, became involved with the Site after the smelter had already been demolished and after all of the contamination was already on the Site. XTRA, the current landowner, played no role in generating any of the "clinker," and only a relatively minor role in using some of the "clinker" that was already on the Site. Moreover, XTRA's minor role in no way alters Blue Tee's primary liability for all of the waste at the Site:

> Based on the broad remedial scope of CERCLA, the Court finds that if an owner or operator who released hazardous substances later allows the removal of such hazardous substances such as mine tailings by a third party (whether or such tailings are sold to a third party) and such tailings are used instead of gravel for ballast for roads and other urbanization projects, then the owner or operator who originally released or disposed of the hazardous substance into the environment is liable for cleanup of the hazardous substance wherever it has come to be located.

*United States v. ASARCO, Inc.,* 2005 WL 1630516 (D. Idaho July 11, 2005).

Considering the radically different levels of involvement that Blue Tee and XTRA have at the Site, any proposal that assigns the same shares of liability to these two companies—as Blue Tee's letter does—would be completely contrary to the equitable principles that govern CERCLA allocations. Thus, Blue Tee's insistence on 38% represents mere posturing that does not come to grips with the relevant facts or the applicable law.

Some Key Facts

XTRA set forth in its July 5 letter numerous facts and circumstances that supported its initial offer to pay 2% of the RI/FS costs. Blue Tee's letter of August 24 notes that "[t]here appears to be little dispute regarding the controlling facts." Blue Tee did go on, however, to discuss some of the facts presented in XTRA's letter, and it may be useful to review briefly some of Blue Tee's main points.

XTRA's Use of Slag at the Site

First, Blue Tee states that XTRA "utilized the slag by grinding it into fine matter and applying it to level the Site." August 24 Letter at 1. Blue Tee also cites an early EPA document which speculated that the slag dispersed at the Site may be more available for migration and off-site transport than the large intact piles of slag that remained on-site.

What Blue Tee neglects, however, is the fact that for half a century its predecessor used the industrial buildings on the Site in the filthy process of smelting zinc. There was little control of air emissions during those decades of smelting, and huge volumes of waste were stored and strewn about the Site.

Historical aerial photographs during zinc smelting operations show a site covered with industrial residues and billowing smoke drifting toward adjacent properties. The slag was produced, stored, and then dumped into piles by Blue Tee's predecessor. XTRA's use of some of that material, in order to level portions of the Site for storage of truck semi-trailers, hardly represented a dramatic change in Site conditions.

Moreover, Blue Tee has not identified how the scope of the RI/FS is in any way affected by XTRA's actions. The collection and analysis of samples from the Site is being driven by historical use of the Site as a zinc smelting facility. Even if XTRA had not spread some of the clinker, the U.S. EPA would still be requiring an RI/FS that included analysis of soil and groundwater samples from the entire Site because the Site was historically covered with industrial residues during zinc smelting operations. It is difficult at this time to quantify the magnitude of either company's practice, but there is no reason to believe that the effects of the slag spread by XTRA could ever approach the effects of the residues dumped on the Site by Blue Tee's predecessor during half a century of zinc smelting operations.

Potential Benefit to XTRA from Increased Property Value

Second, Blue Tee claims that XTRA acquired the Site in a "distress sale" and that XTRA now "will reap any financial benefit from the increased property value once the Site has been remediated." Putting aside the question of what relevance this might have, we know of no evidence to suggest that XTRA's purchase price ($400,000 in 1979) amounted to a "distress sale." Please provide us immediately with the factual support, if there is any, for Blue Tee's statement.

Potential Contamination Unrelated to Zinc Smelting

Third, and last, Blue Tee claims that the RI/FS work includes "investigation of off-site plumes that . . . does [*sic*] not arise from any activities conducted by American Zinc" and "investigation of organic contamination which arises from concern due to XTRA's work at the Site." In other words, Blue Tee seems to be suggesting that XTRA's use of the Site to store truck semi-trailers has somehow resulted in "off-site plumes" and/or "organic contamination." Because Blue Tee provides no support for these statements, it is difficult for XTRA to respond in detail. Suffice it to say that XTRA is unaware of any "organic contamination" at the Site, or any "off-site plumes," that are connected in any way to XTRA's use of the Site for storage of truck semi-trailers. Please provide us immediately with the factual support, if there is any, for Blue Tee's statements.5

Governing Law re Allocation

Apart from making the factual claims that we have addressed above, Blue Tee also disputes the relevance of the case law previously cited by XTRA for the proposition that current owners have frequently been allocated "zero" shares at Superfund sites. Although it is unnecessary to address each of Blue Tee's points here, it is useful to address the highly pertinent case of *PMC Inc. v. Sherwin Williams Co.,* 1996 WL 546869 (N.D. Ill. Sept. 24, 1996), 1997 WL 223060 (N.D. Ill. April 29, 1997), *aff'd in pertinent part,* 151 F.3d 610 (7th Cir. 1999), *cert. denied,* 525 U.S. 1104

(1999).

In the *PMC* case, the Seventh Circuit affirmed in pertinent part a district court decision holding Sherwin-Williams, the former owner of the Site, responsible for 100% of the cleanup costs at issue. According to Blue Tee, however, the district court reached this conclusion "only after recognizing that the sales agreement imposed full responsibility for environmental claims on the former owner."

Unfortunately, Blue Tee fails to grasp the import of this case. The district court did not hold Sherwin-Williams, the former owner, liable under the sales agreement.6 Instead, the district court found that Sherwin-Williams was liable under CERCLA. 1996 WL 546869 (N.D. Ill. Sept. 24, 1996) (granting PMC's motion for summary judgment "that Sherwin-Williams is liable and that the Purchase Agreement did not transfer that liability to PMC.").

Moreover, the district court held Sherwin-Williams liable under CERCLA based on its historic activities, which generated all of the contamination at the Site. As the district court explained, in language directly applicable to Blue Tee:

> Lead, arsenic and other metals found in the soil and groundwater at the PMC Facility at concentrations exceeding applicable clean-up objectives are not used by PMC as raw materials or produced by PMC from any of its processes at the PMC Facility. Those hazardous substances are highly toxic. They are present at the PMC Facility solely as the result of Sherwin-Williams' historic production and disposal activities during its ownership . . . . The contamination by those hazardous substances extends throughout the PMC Facility, and remediation of those substances will require remediation of the entire site.

1997 WL 223060 at 3 (N.D. Ill. April 29, 1997) (emphasis supplied).

Based primarily on these considerations, the district court performed an equitable allocation and assigned a "zero" share to PMC, the current owner of the Site, even though PMC's activities might also have caused some relatively minor contamination. 1997 WL 223060 at 3, 8 (N.D. Ill. April 29, 1997). We are fully confident that XTRA would receive a similar share in any litigation with Blue Tee at this Site.

## Good-Faith Negotiations

At the end of its August 24 letter, Blue Tee says that it "is interested in reaching a reasonable resolution with XTRA on the RI/FS costs and not dissipating the parties' resources in litigation." XTRA shares those same interests. Moreover, despite the language in Blue Tee's September 2 letter, requiring a minimum of a 38% offer, XTRA specifically reaffirms its commitment to engage in good-faith negotiations with Blue Tee in an effort to resolve the matter of XTRA's equitable share of the RI/FS costs.

As a tangible expression of that commitment, XTRA hereby offers to pay 2% of the cost of the RI/FS, up to a maximum of $50,000.00, without regard to the various credits discussed in our July 5 letter.7 XTRA reserves the right, however, to claim those same credits at a later stage in the CERCLA process at this Site. Please let me know whether Blue Tee is prepared to accept this offer.

If you have any questions about any aspect of this letter, please do not hesitate to call.

Very truly yours,

Michael W. Steinberg

Counsel for XTRA Intermodal, Inc.

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1 As with XTRA's July 5 letter, this letter is being issued under the compulsion of a federal governmental agency order that carries with it the threat of substantial civil penalties for willful non-compliance. Due to this compulsion, this letter does not constitute a waiver of any privilege or other applicable protection, or an admission of any fact or any legal issue. Nor does it represent any admission of any liability whatsoever on the part of XTRA, either with regard to the RI/FS work or with regard to any future response action(s) at the Site.

2 Blue Tee's accusation is completely unfounded and cannot obscure the complete lack of factual support for the extreme position that Blue Tee is taking here.

3 In yet another letter, dated September 13, 205, Mr. Greenberg complained that XTRA "inexplicably failed" to send him a copy of XTRA's very brief letter of September 1. For the record, EPA's Unilateral Administrative Order directs that all communications with Blue Tee and GSA pursuant to the Order "shall be sent . . . to the following," and then goes on to name Ms. Faye, Mr. Pinkston, and Mr. Schafer. *See* Order ¶ 61. The Order does not mention Mr. Greenberg. Given Blue Tee's role in encouraging EPA to issue the Order in the first place, XTRA assumed that the Order named the correct contact person(s) for Blue Tee. That is why XTRA addressed its letter to Ms. Faye and not to Mr. Greenberg. In order to avoid needless confusion, however, XTRA is copying Mr. Greenberg on this letter, and will do so on any future correspondence of this type.

4 GSA has agreed to pay a higher share (45%) of certain non-smelter-related costs.

5 We note that GSA has agreed to pay twice as large a share (45%) of the RI/FS costs related to contamination from "organics." *See* AOC Docket No. V-W-05-C-820, ¶ 93. This suggests that any organics of potential concern were generated during the period when the United States was involved at the Site, and not when XTRA was involved. Blue Tee's position, as reflected in its letters of August 24 and September 2, fails to take account of this fact.

6 Indeed, PMC did not even argue that Sherwin-Williams was liable under the contract. 151 F.3d at 615 ("PMC argues not that the contract requires Sherwin-Williams to identify PMC . . . but only that the contract does not require PMC to indemnify Sherwin-Williams . . . .").

7 As with XTRA's July 5 letter, this letter constitutes an offer to resolve legal claims that Blue Tee Corp. and GSA have previously asserted against XTRA. Under Rule 408 of the Federal Rules of Evidence, this letter is not admissible in any judicial or administrative proceeding.